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In the Supreme Court of the United States

OCTOBER TERM, 1960

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, LOCAL UNION NO. 310, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 22-35) is not yet reported. The Board's Decision and Order (J.A. 111-143)[1] is reported at 119 NLRB 998, and its Decision and Order on Remand (*infra*, pp. 13-36) is reported at 124 NLRB 494.

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[1] "J.A." refers to the joint appendix to the briefs of the parties filed in the court below.

JURISDICTION

The judgment of the court below (Pet. 23) was entered on June 16, 1960. The petition for a writ of certiorari was filed on September 9, 1960. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the National Labor Relations Board, upon finding that the employer violated the bargaining requirements of the National Labor Relations Act by failing to discuss with the Union a change in its method of operation, acted within its authority under Section 10(c) of the Act, to provide such remedy "as will effectuate the policies of [the] Act," in requiring the employer merely to bargain with the Union concerning the continuance of the new arrangement and to cease and desist from taking such unilateral action in the future, but not to undo the action already taken.

STATUTE INVOLVED

The relevant statutory provisions are set forth at pages 3-5 of the Petition.

STATEMENT

A. The Board's findings of fact

The Company sells its dairy products in the Tucson, Arizona, area. In July 1955, it employed approximately 70 drivers who sold its products under a con-

ventional salary plus commission arrangement. The drivers, along with the plant men, were represented by petitioner union, under a contract which was due to expire October 1, 1955. At a series of meetings, beginning on July 12, 1955, Company officials advised the drivers that, for the past year, the Company had under consideration a distributorship plan, under which the drivers would operate as independent contractors (J.A. 112, 148; 62). After the details of the plan had been explained, all but six of the drivers, voluntarily signed individual distributorship contracts (J.A. 113, 148). The six drivers who did not wish to become independent distributors continued working under the terms of the Company's contract with the Union, until its expiration on October 1, 1955. Two days later, the Company notified the six drivers that their services were no longer required because they had shown no interest in purchasing a milk route. (J.A. 113-114, 150.)

Meanwhile, by letter dated July 29, 1955, the Union notified the Company that its signing of individual contracts with the drivers constituted a breach of the current collective bargaining agreement (J.A. 113, 148-149). On October 3, the Company met with the Union and submitted a proposal which excluded the drivers, on the ground that they were now independent contractors. (J.A. 113, 149.) The Union requested a postponement (J.A. 113, 149), and the parties have not bargained further on this matter.

Under the independent distributorship plan instituted by the Company, the drivers bought their trucks

and routes from the Company, and derived their income from profits realized in the sale of products purchased from the Company. Although the Company reserved the right to operate a route in an emergency and also reserved the right to recapture a route on 30 days' notice, the plan vested the drivers with a large measure of discretion and control. Except for general instructions regarding routes and hours of delivery, handling and development of the routes were left to the judgment and discretion of the drivers. The plan shifted responsibility for truck maintenance, licensing, and insurance from the Company to the drivers, who were also made directly responsible for compliance with all laws, rules and regulations relating to health and sanitation. Similarly, the drivers paid their own Social Security and other taxes. Moreover, although all sales were previously made at uniform prices set by the Company, the drivers could now set their own prices. And, they were permitted to purchase their own advertising media, and to have their names painted on the trucks. (J.A. 118-120, 151-152, 70-82.)

B. The Board's initial decision and order

Based upon these facts, the Board, on December 16, 1957, concluded that the Company violated Section 8(a)(5) of the Act by adopting the independent distributorship plan without affording the Union an opportunity to bargain with respect thereto, but that the Company had not violated Section 8(a)(3) by terminating the employment of the six drivers who

refused the plan (J.A. 120-124). This conclusion, however, was arrived at by varying routes.

Chairman Leedom found that the drivers who signed independent distributorship contracts converted their status from that of an employee to that of an independent contractor excluded from the Act. However, before adopting the plan, the Company was obliged to bargain with the Union, and its failure to do so constituted a violation of Section 8(a)(5) (J.A. 122). In view of his holding, he found it unnecessary to determine whether the Company's conduct also constituted an unlawful refusal to bargain because of non-compliance with the notice requirements of Section 8(d) of the Act (J.A. 122, n. 13). Chairman Leedom further found that, as the Company adopted the plan for economic reasons and not to avoid bargaining with, or to discourage membership in, the Union, the Company had not violated Section 8(a)(3) of the Act by discharging the drivers who did not wish to purchase their routes (J.A. 124-125).

Member Murdock concurred in Chairman Leedom's finding that the Company had unlawfully bypassed the Union in adopting the independent distributorship plan. However, he dissented from his finding that the plan established an independent contractor relationship and would have found that the Company further violated Section 8(a)(5) of the Act by executing individual contracts of employment with the drivers and by failing to comply with the requirements of Section 8(d) before so modifying its collective bargaining agreement with the Union (J.A.

129-133). Member Murdock would also have found that the six drivers who refused to enter the plan were discharged as a consequence of their exercising a right to refrain from individual bargaining with the Company, and therefore that their discharges were violative of Section 8(a)(3) of the Act (J.A. 134-135).

Member Bean found no refusal to bargain on the ground that the record did not establish that the Union represented a majority of the Company's drivers at the time of the alleged refusal to bargain (J.A. 138-141). Moreover, he agreed with Chairman Leedom that the Company did not violate Section 8(a)(3) by discharging the non-signing drivers.

To remedy the violation found by Chairman Leedom and concurred in by Member Murdock, the Board entered an order (J.A. 126-128) which required the Company to cease and desist from refusing to bargain with the Union with respect to the adoption or continuance of the independent distributorship plan insofar as it affects the tenure of its employees, and from entering into any new independent distributorship contract with any person unless and until it bargains with the Union concerning the plan. Affirmatively, the order required the Company to bargain collectively with respect to the plan insofar as it affects employee tenure, and to post an appropriate notice.

C. The Board's supplemental decision

The Union sought review of the Board's Decision and Order in the court below, which, after hearing,

remanded the case to the Board for further consideration (Pet. 8-9). After such reconsideration, the Board entered a Decision and Order on Remand (*infra*, pp. 13-36). Chairman Leedom and Member Bean adhered to their previous positions, except that Chairman Leedom additionally found that the Company did not violate Section 8(d) by instituting the independent distributorship system without complying with the notice requirements of that Section (*infra*, pp. 17-19, 30-34). Members Jenkins and Fanning[2] reached substantially the same conclusions previously reached by Member Murdock (*infra*, pp. 19-26).

The Board, having upon reconsideration found the same violation as previously, entered an order identical with the previous order (*infra*, pp. 28-30).

D. The decision of the Court of Appeals

The court below, Judge Washington dissenting, enforced the Board's order. The court found that the drivers became independent contractors upon signing distributorship contracts, that the discharge of the non-signing drivers resulted from a "reduction in force," and that the Company's failure to discuss the independent distributorship plan with the Union "technically violated the Act." In these circumstances, the court concluded that the Board's order was an appropriate remedy (Pet. 23).

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[2] Member Fanning, in the meantime, had replaced Member Murdock. Member Rodgers did not participate in the decision.

ARGUMENT

The decision of the court below is correct; it is limited to the peculiar facts of this case; and it does not conflict with that of any other court of appeals. No issue warranting review by this Court is presented.

1. The sole question presented is whether the Board abused its discretion under Section 10(c) of the Act, to provide such remedy "as will effectuate the policies of this Act," in merely requiring the Company to bargain with the Union concerning the continuation of the independent distributorships and to refrain from establishing new ones unilaterally, instead of also requiring that the Company cancel the individual contracts outstanding and reemploy the six drivers who were terminated for failure to enter into such contracts. On the facts of this case, the Board's order was not unreasonable.

The Company violated the Act only in that it failed to give the Union an opportunity to discuss the independent distributorship plan as it affected the tenure of the drivers. The Company's omission stemmed from its good faith belief that, since independent contractors are outside the Act, the drivers could determine for themselves whether they wished to abandon their employee status and become independent contractors. It further appears that the drivers signed the independent distributorship contracts voluntarily, entering into, as the court below could properly find (see p. 11, *infra*), a genuine independent contractor relationship. To require the Company to bargain

with the Union respecting the continuation or extension of the plan, without abrogating the contracts already entered into, provides an effective remedy for the limited unfair labor practice which was committed, while at the same time preserving, unless and until the parties should determine otherwise, a relationship created in good faith.

Thus, since the individual contracts are terminable upon 30 days' notice by any contracting party, the Company, if persuaded by the Union in the future bargaining negotiations, may readily return to the employee method of distributing its products. Moreover, the Union's bargaining position, insofar as it rests upon driver support, is not compromised by continuing the contracts in effect. For, if the drivers are dissatisfied with the new system, they will presumably back the Union's efforts to return to the old method. On the other hand, the Union cannot complain if the drivers are still willing to forego collective bargaining rights under the Act for the benefits under the independent contractor plan.

Nor did the Board abuse its discretion in declining to order reinstatement of the six drivers who were terminated for failure to enter into the individual contracts. The Company discharged these drivers because they would not work as independent contractors and not in reprisal for having insisted on bargaining through the Union. As the discharges were unrelated to union activity, vindication of the statutory policy against discrimination did not require ordering these employees reinstated with back pay. Nor is such relief required under Section 8(a)(5) to remedy

the Company's failure to bargain with the Union over the adoption of the independent distributorship plan, for this violation is adequately remedied by preventing a recurrence of the unfair labor practice, and ensuring collective bargaining in the future.

In sum, the remedy provided by the Board was adequate for the limited violation found.

2. The fact that the court below did not pass on the question of whether the Company's action violated Section 8(d) of the Act, does not, as petitioner suggests (Pet. 12, 14-17), impair this conclusion. Section 8(d) provides that a party to a collective agreement shall not terminate or modify that agreement without giving a 60-day notice to the other party, and that, while the notice period is running, he shall continue the agreement in full force and effect, without resorting to strike or lockout. Under the facts, as the court below viewed them, it was unnecessary for it to consider whether the Company's action violated Section 8(d), for, even had it so concluded, this would not have compelled any additional relief. The violation of Section 8(d) would be essentially the same as the violation of Section 8(a)(5) already found by the Board, i.e., a premature modification of the existing agreement without notification to the other party. Just because Section 8(d) specifies that the contract shall be kept in full force during the notice period, it does not follow that, if there is a failure to comply with this requirement, the only appropriate relief is the restoration of the *status quo*. Under the particular circumstances of this case, the court

below could well have concluded that the relief provided by the Board for the Section 8(a)(5) violation would also have been a sufficient remedy for the Section 8(d) violation.

Nor, contrary to petitioner's contention (Pet. 13, 18-20), is an issue warranting review presented by the finding of the court below that the drivers became independent contractors by entering into the individual distributorship contracts. On the facts set forth pp. 3-4, *supra*, ample basis existed for this conclusion. See *United States* v. *Silk*, 331 U.S. 704. In any event, the difference between the members of the Board and the members of the court on whether an independent contractor status was created is not over the principle to be applied, but only with respect to the inferences to be drawn from the facts. There is no occasion for this Court to review the Court of Appeals' resolution of this factual issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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OCTOBER 1960.

APPENDIX

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case No. 21-CA-2292

SHAMROCK DAIRY, INC., SHAMROCK DAIRY OF PHOENIX, INC., AND SHAMROCK MILK TRANSPORT CO.

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL UNION NO. 310

DECISION AND ORDER ON REMAND

On December 18, 1957, the National Labor Relations Board, acting through a panel composed of Boyd Leedom, Chairman, and Abe Murdock and Stephen S. Bean, Members, issued its Decision and Order in the above-entitled proceeding.[1] A majority of the panel, consisting of Chairman Leedom and Member Murdock, found that the Respondent had refused and was refusing to bargain collectively with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 310, the charging Union, and ordered the Respondent to cease and desist therefrom and take certain affirmative action. Member Bean dissented from that portion of the Decision and Order. Another majority of the panel, consisting of Chairman Leedom and Member Bean, found that the Respondent had not violated Section 8 (a) (3) of the Act by discharging

[1] 119 NLRB 998.

six drivers and dismissed the remaining allegation of the complaint alleging such a violation. Member Murdock dissented from that portion of the Decision and Order.

Thereafter, on November 5, 1958, after hearing oral argument on the Union's petition to review and modify the Board's Order in this case, the United States Court of Appeals for the District of Columbia "concluded that it cannot properly review the Order of the . . . Board without specific findings" on certain questions which are hereinafter set forth, and directed the Board to make such findings and transmit them to the Court.

Thereafter, on February 26, 1959, upon the Board's application,[2] the Court rescinded the remand previously ordered and remanded the case to the Board "with directions to reconsider the entire cases (sic), including, but not limited to, the questions specified in the Order of November 5, 1958."

The questions specified in the Court's remand are as follows:

> (1) Whether, upon the facts of this case, the drivers retained their employee status notwithstanding the negotiation of the individual contracts between the employer and the drivers, or whether their status changed to that of independent contractor.
>
> (2) Whether, if the Board should find that the drivers became independent contractors, the employer, Shamrock Dairy, Inc., violated Section 8 (d) of the National Labor Relations Act when

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[2] In the interim, the composition of the Board's membership had changed. Member Murdock's term of office expired on December 16, 1957; he was succeeded by Member John H. Fanning.

it negotiated the individual contracts with the drivers.

(3) . . . should the Board find that Section 8 (d) was violated, . . . whether Section 8 (a) (3) was violated by the employer's discharge of the six employees.

Pursuant to the Court's remand order, the entire Board, with the exception of Member Rodgers who disqualified himself, has considered the case *de novo*. The Chairman, Member Bean, and Members Jenkins and Fanning, respectively, have divergent views as to the disposition of this case. In accordance with such views, there is herewith transmitted to the Court the following findings and determinations:

With respect to jurisdiction, the Board hereby makes the same findings and determinations made in the Board's Decision and Order of December 16, 1957.

The Board hereby denies the Respondent's request for oral argument; as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. Accordingly, the rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner set forth in his Intermediate Report, a copy of which is attached hereto, only to the extent consistent herewith.[3]

[3] Among other things, the Trial Examiner found that, by "making credits in the retirement fund immediately avail-

The Board hereby makes the same findings of fact which were set forth as the essential facts in this case in the Board's Decision and Order of December 16, 1957.

A majority of the Board, consisting of the Chairman and Members Jenkins and Fanning, find that the Union had majority status and was at all times material the exclusive representative of the employees involved here. The Respondent granted exclusive recognition to the Union as the representative of the Respondent's employees in the 2-year contract, executed on October 1, 1953. Such recognition raises a presumption of regularity, namely, that the Union was the majority representative of the employees at the time of the execution of the contract; for, otherwise, it would have been unlawful for the Respondent to have extended such recognition. There is no evidence to rebut this presumption. Nor is there any evidence that the Union lost such majority status at any time after execution of the contract. By virtue of the existence of the contract, the Union was entitled to exclusive recognition for at least the term of the contract. *Hextron Furniture*, 111 NLRB 342. *N. L. R. B.* v. *Dorsey Trailers, Inc.*, 179 F. 2d. 589 (C.A. 5), relied on by the Respondent, is inapposite. There, unlike here, the contract had terminated before the time of the alleged refusal to bargain. On the basis of the foregoing, the Respondent was obligated to treat with the Union as the majority representative of the employees at the time of the alleged unfair labor practices which occurred in the period

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able to those who purchased routes", the Respondent independently violated Section 8 (a) (1). There is no such allegation in the complaint and the record evidence does not support such an allegation.

from sometime in July to October 3, 1955, inclusive.

Member Bean finds that the Union did not represent a majority of the employees at the time of the alleged unfair labor practices, as more fully set forth in his separate opinion filed herewith. Member Bean states therein that "the contract can be of no value as an indication of the Union's status among the Respondent's employees considered as a separate unit" because, in substance, the contract covered other employers as well as the Respondent. However, as pointed out in the decision of December 16, 1957, the complaint alleged that the Respondent's employees alone constituted an appropriate unit and the Respondent's answer admitted that the Respondent contracted with respect to such unit in the contract of October 1953. Moreover, the Respondent's answer further admitted that such contract unit was "an appropriate unit"; the Trial Examiner found that the Respondent's employees alone constituted an appropriate unit; and the Respondent at no time took the position that a more comprehensive unit was appropriate.

Adhering to his previously expressed position in the Decision of December 16, 1957, and for the reasons stated therein, the Chairman finds that the Respondent, which had theretofore distributed its products through driver-salesmen, entered into individual contracts with the bulk of its driver-salesmen which converted their status from that of employees to that of independent contractors, without any notice and without bargaining with the Union, the recognized exclusive representative under an existing contract. The Chairman further finds that the Respondent adopted the new distributorship system for economic reasons and that, in discharging the six drivers who refused to sign independent distributorship contracts,

the Respondent was motivated by economic reasons and thus did not violate Section 8 (a) (3) of the Act. In addition, the Chairman finds, even though the drivers became independent contractors under the individual contracts, that the Respondent violated Section 8 (a) (5) and (1) of the Act in that it failed to bargain with the Union as to whether the independent contractor system of distribution should be adopted.

In the Decision of December 16, 1957, the Chairman stated that, as he had found a violation of Section 8 (a) (5) on another ground, he had no occasion to pass on whether the Respondent also violated Section 8 (a) (5) by reason of a violation of Section 8 (d). Accordingly, in the Decision of December 16, 1957, the Chairman did not pass on whether the Respondent violated Section 8 (d). Pursuant to the Court's remand, the Chairman now makes a determination of that issue and, in doing so, finds that the Respondent did not violate Section 8 (d) for the following reasons.

Insofar as pertinent, Section 8 (d) provides that: ". . . where there is in effect a collective bargaining contract covering employees . . ., the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification" . . . serves written notices 60 days prior to the expiration date of the contract . . . and continues in full force and effect, without resorting to strike or lockout, "the existing contract for a period of 60 days after such notice is given or until the expiration date of such contract, whichever occurs later. . . ". At the time of the establishment of the independent distributorship plan here in July 1955, there was in existence a collective bargaining contract which was

to expire on October 1, 1955. No statutory notices were served by the Respondent. However, although the Respondent executed individual contracts with the bulk of the drivers, these contracts were not contracts of employment and the Respondent continued in full force and effect the provisions of the collective bargaining contract until October 1, 1955, with respect to those drivers who did not sign individual contracts and as to plant employees (nondrivers) who were covered by the collective bargaining contract but not directly affected by the institution of the independent distributorship system for drivers. The execution of the individual contracts was not inconsistent with the collective bargaining contract as the individual contracts pertained not to terms or conditions of employment but involved the termination of the employment status of the drivers who signed the individual contracts and substitution therefor of the status of independent contractor. Thus, no provision in the individual contracts conflicted with or changed the collective bargaining contract in any respect. See *Sloan* v. *Journal Publishing Co.*, 42 LRRM 2490; *Adams Dairy Co. v. Dairy Employees Union*, 363 Mo. 182, 250 S. W. 2d 481, 30 LRRM 2128. As the Respondent did not modify or terminate the collective bargaining contract, the Chairman finds that there was no violation of Section 8 (d).

Members Jenkins and Fanning agree with the Chairman for the reasons stated hereinafter that the Respondent violated Section 8 (a) (5) and (1) by failing to bargain with the Union as to whether the so-called independent contractor system of distribution should be adopted.

The Respondent adopted the so-called independent distributorship plan without notice to the Union and entered into individual contracts with the drivers

without giving the Union, the exclusive bargaining representative, a chance to negotiate with regard to the tenure of the employees to be affected by the alleged independent distributorship plan. Thereafter, the Respondent ignored the Union's letter requesting rectification of the change and notified the Union that the Respondent would not bargain with respect to those drivers who had signed individual contracts. By this course of conduct, the Respondent failed to perform its duty to bargain collectively. This duty includes the obligation to notify the collective bargaining representative and to give such representative a chance to negotiate with respect to a contemplated change concerning the tenure of the employees and their conditions of employment. *Brown Truck*, 106 NLRB 999. In *Brown Truck*, where the employer moved its Charlotte plant to Monroe, N. C., for economic reasons, discharged its Charlotte employees, and did not employ them at Monroe, the Board found that the employer violated Section 8 (a) (5). Here, as in *Brown Truck*, the employer did not give the Union an opportunity to bargain with respect to the contemplated change as it affected the tenure of the employees. The Union was entitled to such opportunity, and the Respondent failed and refused to accord it. By such conduct, the Respondent violated Section 8 (a) (5) and (1) of the Act.[4]

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[4] The Respondent contends that the Union waived its bargaining rights with respect to the institution of the so-called independent distributorship plan by not requesting bargaining concerning it, by advising the drivers to consult a lawyer as to whether they should sign the individual contracts offered, and by taking no action other than outlined in the statement of facts referred to above. However, as the Trial Examiner found, the Union made an adequate request to bargain in its letter of July 29, 1955. On August

In addition thereto, Members Jenkins and Fanning also find, as did the Trial Examiner, that the Respondent violated Section 8 (a) (5) and (1) of the Act on the following two grounds: (1) The drivers retained their employee status under the individual contracts, and thus the Respondent engaged in unlawful individual bargaining by execution of the individual contracts; and (2) as the drivers retained their employee status under the individual contracts, the Respondent modified or terminated the collective bargaining contract by the execution of the individual contracts without complying with the notice requirements of Section 8 (d).

With respect to the first of the foregoing two additional grounds, Members Jenkins and Fanning are of the view that the drivers retained their employee status under the individual contracts for the following reasons. An employer-employee relationship exists where the person for whom the services in question are performed reserves the right to control not only the result to be achieved but also the means to be used in reaching such result.[5]

An examination of the provisions of the individual distributorship contract reveals that the Respondent's

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2, 1955, the Union promptly filed refusal to bargain charges based upon institution of that plan. At the bargaining meeting of October 3, 1955, the Respondent expressly stated that it would not recognize the Union with respect to those drivers who had signed individual contracts. And, as the Trial Examiner found, any attempt by the Union thereafter to bargain with respect to those drivers would have been futile. For these reasons, the Board finds no merit in the waiver contention.

[5] See, for example, *Oklahoma Trailer Co., Inc.*, 99 NLRB 1019, 1022; *Nu-Car Inc.*, 88 NLRB 75, 83, enf'd 189 F. 2d (C.A. 3).

drivers who signed such a contract did not lose their existing employee status by execution of the individual contracts. In the individual contract, the Respondent granted to the drivers the exclusive right to distribute its products upon express terms set forth therein. These terms included (1) in the event that the Respondent determined that the territory assigned to a driver was too large for the driver adequately to service, the Respondent at any time could alter the boundaries of the territory to assure to the Respondent's satisfaction that customers were properly serviced; (2) that a driver must not sell any product in his territory not manufactured by the Respondent; (3) that the Respondent would set the prices at which its products are sold to a driver, and the Respondent reserved the absolute right to change those prices; (4) that the Respondent could prescribe the time and places at which delivery of its products to the drivers must be received as well as prescribe the times and places for delivery of its products to customers; (5) that the Respondent retained the "continuing, unconditional and irrevocable option to purchase at any time the entire distribution business" of a driver, including the truck, route, clientele, and good will, at a preestablished price, and that the driver had no right to sell or assign any rights under the contract without the Respondent's consent; (6) in the event the Respondent exercised the option to purchase the business, the driver could not re-enter the business of distributing dairy products for a period of two years; (7) that , if the Respondent determined that customers would not receive promptly delivery of its products because of "any accident, strike, emergency or any other cause," the Respondent would take over a driver's route and equipment, without notice to him, and operate and

continue same during these periods; (8) that a driver must diligently and faithfully promote sales of the Respondent's products, complying with all laws, rules, and regulations relating to health and sanitation, and maintain a neat and tidy appearance; (9) that drivers were required to insure their trucks for property damage in certain stated substantial amounts, all insurance policies to be approved by the Respondent; (10) that in the event a driver's truck broke down, the Respondent would furnish a spare truck at no expense to the driver except for gasoline and oil; however, if the driver chose to use a vehicle other than that provided by the Respondent, the Respondent must first approve the use of such vehicle; and (11) in the event that a driver became incapacitated and was unable to perform his duties, the driver must select a substitute named and approved by the Respondent and the driver was required to compensate the substitute at a wage and commission fixed by the Respondent.

Thus, the individual contracts reserved to the Respondent the right to terminate unilaterally the services of the driver for any cause, the right unilaterally to name and appoint substittues for the driver and to fix the compensation of such substitutes, the right unilaterally to determine the times and places at which the driver's services are to performed, and the right to police the manner in which those services are rendered. Moreover, under the terms of the individual contract the driver was required to deal exclusively in the Respondent's products. Under all the circumstances, Members Jenkins and Fanning conclude that the individual contracts here involved did not convert the status of the drivers who signed them from that of employees to that of independent contractors and that the drivers retained their em-

ployee status under the individual contracts. Member Jenkins and Fanning further find that the execution of the individual contracts with such drivers who were and remained employees of the Respondent constituted individual bargaining with those individual employees at a time when they were represented by the Union as their statutory representative, and thus the Respondent violated Section 8 (a) (5) and (1) of the Act.

With respect to the second of the two additional grounds referred to above, Members Jenkins and Fanning are of the view that the Respondent, by the execution of the individual contracts, modified or terminated the collective bargaining contract, without complying with the notice requirements of Section 8 (d) of the Act, for the following reasons. By enactment of Section 8 (d), the terms of which are set forth above, Congress intended to insure that parties to contracts in industries covered by the Act resort to collective bargaining to resolve differences regarding modification or termination of such contracts rather than to engage in strikes or lockouts which would obstruct commerce. To this end, parties to such contracts are obligated by Section 8 (d) to give proper notice of their intention to modify or terminate them and to offer to meet to resolve their differences. When the Respondent adopted its so-called independent distributorship plan by executing individual contracts with its drivers, it was under contract with the Union which was the statutory representative of its drivers. That contract expressly provided that "no employee shall be required to make a verbal or written contract which in any way conflicts with the articles of this agreement." When the Respondent required its drivers to execute the individual contracts on pain of discharge, the Respondent was acting to modify

the collective bargaining contract with the Union, as the terms of the individual contracts changed the terms of the collective bargaining contract and were inconsistent therewith. Nevertheless, the Respondent gave no notice to the Union of intent to modify its contract and did not offer to meet with the Union to discuss this determination. Thus, the Respondent failed to discharge the duties imposed upon it by Section 8 (d). Members Jenkins and Fanning, therefore, find that, by such conduct, the Respondent violated Section 8 (a) (5) and (1) of the Act.

Members Jenkins and Fanning also find, as did the Trial Examiner, that the six drivers, who refused to sign individual contracts, retained their status as employees, and that the Respondent violated Section 8 (a) (3) by discharging the six drivers. Members Jenkins and Fanning reach this conclusion on the basis of the following rationale. As the Union was the exclusive bargaining representative, the six drivers had a right to refuse to deal with the Respondent on an individual basis; the drivers were exercising such right in refusing to enter into individual contracts; and they were discharged for so doing.

Even if the Respondent did not violate Section 8 (a) (3) by discharging the six drivers, Members Jenkins and Fanning would order their reinstatement with back pay to remedy the 8 (a) (5) violation hereinafter found. *West Boylston Mfg. Co.*, 87 NLRB 808. Such relief is not limited by the Act to those cases in which the Board has found that Section 8 (a) (3) has been violated. The statute empowers the Board to fashion the remedy to the situation which calls for redress. In *West Boylston*, the Board found that an employer violated Section 8 (a) (5) by failing to confer with a union as to the recall of laid-off employees. Here, as in *West Boylston*, where

the Board ordered reinstatement with back-pay for the employees not recalled but not found to have been discriminated against within the meaning of Section 8 (a) (3), the six drivers lost their jobs as a direct consequence of the Respondent's failure to confer with the Union, and, by parity of reasoning, they should be restored to their jobs and made whole.

Member Bean finds that the Respondent engaged in no unfair labor practice alleged and votes to dismiss the entire complaint for the reasons stated in his separate opinion filed herewith.

Based on the combined vote of the Chairman and Members Jenkins and Fanning, the Board hereby finds that the Respondent violated Section 8 (a) (5) and (1) of the Act, as set forth above.

As indicated above, the Chairman and Member Bean have found that the Respondent did not violate Section 8 (a) (3) by discharging the six drivers, while Members Jenkins and Fanning have found that the Respondent committed such unfair labor practices. Under these circumstances, as a majority of the Board does not find that the Respondent violated Section 8 (a) (3) of the Act, the Board will dismiss the allegation of the complaint that the Respondent violated Section 8 (a) (3) of the Act by discharging the six drivers.

The Remedy

Chairman Leedom and Members Jenkins and Fanning have found that, by not according the Union an opportunity to bargain with respect to the adoption of the individual distributorship system as it affected the tenure of the employees, the Respondent violated Section 8 (a) (5) and (1).

Members Jenkins and Fanning are of the view that the remedy, which is set forth below, does not go far

enough to remedy the violation found. As the remedy in this case does not abrogate the unlawful individual contracts, they are of the view that it fails to restore the *status quo ante* and permits the Respondent to retain the fruits of its unlawful conduct. Accordingly, Member Jenkins and Fanning would order abrogation of these contracts so that effective bargaining on this subject may take place. However, Members Jenkins and Fanning, of course, go at least as far as the remedy ordered, and, therefore, they concur in this remedy for the purpose of framing a majority order in the case.

To remedy this violation, the Board finds that it will effectuate the policies of the Act to require that the Respondent accord the Union such an opportunity to bargain. Accordingly, we shall order that the Respondent bargain with the Union as the exclusive representative of employees in the appropriate unit, including the employees who signed individual distributorship contracts, concerning the subject matter stated above; and we shall enjoin the commission of the unfair labor practices found through the usual cease and desist provisions in our Order.

Pending fulfillment of its obligation to bargain, we shall require that the Respondent refrain from entering into any new independent distributorship contract with any person.[9]

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[9] The Board is aware that it has not resolved, by majority vote, the questions propounded by the Court in its remand order, but this is due to the fact that despite careful and persistent Board deliberations extending over a considerable period of time, a majority of the Board has been unable to reach agreement as to how these questions should be answered. In lieu thereof, each signatory to the instant Decision has submitted his individual views.

ORDER

Upon the entire record in this case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Shamrock Dairy, Inc., Tucson, Arizona, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 310, as the exclusive representative of all regular relief and special drivers, and all plant men employed at the dairy of Shamrock Dairy, Inc., at Tucson, Arizona, but excluding all office and clerical employees, guards and supervisors as defined in the Act, with respect to adoption or continuance of a system of product distribution known as the independent distributorship plan insofar as it affects the tenure of its employees;

(b) Entering into any new independent distributorship contract with any person unless and until it bargains with the aforesaid labor organization as stated above;

(c) In any like or similar manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 310, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any or all such activ-

ities, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act.

(a) Bargain, upon request, with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 310, with respect to adoption or continuance of a system of product distributorship known as the independent distributorship plan insofar as it affects the tenure of its employees in the aforesaid appropriate unit, in accordance with the section of this Decision and Order On Remand entitled, "The Remedy."

(b) Post at the dairy in Tucson, Arizona, copies of the notice attached hereto as an Appendix.[3] Copies of such notice, to be furnished by the Regional Director for the Twenty-first Region, shall, after being duly signed by the Respondent's authorized representative, be posted by the Respondent immediately upon receipt thereof and be maintained by it for sixty (60) consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material;

(c) Notify the Regional Director for the Twenty-first Region in writing, within ten (10) days

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[3] In the event this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "PURSUANT TO A DECISION AND ORDER ON REMAND" the words "PURSUANT TO A DECREE OF THE UNITED STATES COURT OF APPEALS, ENFORCING AN ORDER."

from the date of this Order, as to what steps the Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be, and it hereby is, dismissed insofar as it alleges that the Respondent violated Section 8 (a) (3) of the Act by discharging John Foley, Dave Egleston, Robert Pry, Alexander Toro, Frank Koenig, and John Kozacki.

Dated, Washington, D. C. Aug. 13, 1959

Boyd Leedom, Chairman
Joseph Alton Jenkins, Member
John H. Fanning, Member
(SEAL) NATIONAL LABOR RELATIONS BOARD

STEPHEN S. BEAN, MEMBER, dissenting in part and concurring in part:

This case is now before this Board on remand from the Court of Appeals for the District of Columbia under directions to reconsider the entire case, including certain questions set forth in a previous order of the court. Pursuant to this remand I have given the entire case my careful reconsideration and again am impelled to the conclusion which I set forth in my original dissenting opinion, that the record presents a material issue as to the fact of the charging Union's majority status which is crucial to the entire case and which can only be answered in the negative.

In this case, the charging Union's majority status was put in issue by the complaint's allegation that at all material times the Union represented a majority of the Respondent's employees, and the Respondent's answer asserting a lack of knowledge or information as to such majority, by reason of which it denied the allegation and demanded strict proof

thereof.[8] The Respondent did not abandon this position but continued to maintain it at the time this case was originally considered by the Board, as shown by its filing of an exception to the Trial Examiner's finding of the Union's majority status based upon the Respondent's execution of the contract in 1953.

The record shows that the Respondent has dealt with the Union, apparently on a multi-employer basis, since 1937. In October 1953 the Respondent, together with Borden Company, Carnation Company, and Sunset Dairy, all of Tucson, Arizona, entered into a contract with the Union covering the drivers and plantmen of these four employers together in a single unit, for a two-year term to October 1, 1955. The record contains not a bit of evidence that at any time from the beginning of, or during, this contractual relationship did the Union offer or the Respondent request any sort of proof of the Union's right to serve as a majority bargaining representative, either for the employees in a multi-employer unit or for a unit limited to the Respondent's employees. Nor does the record contain any evidence that the Union was in fact such a representative.[9] Indeed, insofar as the

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[8] Paragraph 6 of the complaint alleged that:

"At all times material herein, the Union has represented a majority of the employees of Respondent Dairy, Inc., in the unit described . . . above."

The following appears in the Respondent's answer:

"Answering Paragraph 6 of the complaint, Respondent Dairy, Inc. alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and therefore denies the same and demands strict proof thereof.

[9] In lieu of evidence, my majority colleagues have relied upon two presumptions—(1) that possession by the union of majority representative status may be presumed from the

Respondent's own employees are concerned, I can only judge from the Respondent's answer formally denying knowledge of possession by the Union of majority status, that at least on the Respondent's part its recognition of and dealing with the Union must have been purely a "sweetheart" arrangement. This is a matter not to be taken lightly, for in this state of the record the Board is entirely without au-

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mere fact of the Respondent's recognition of and dealing with the union, and (2) that such status, thus established, is presumed to continue thereafter in the absence of evidence to the contrary. With the latter of these two presumptions I could, as a matter of general legal principle, agree; but I cannot agree that such a presumption as the former one exists, or, if it did exist, that it would not be completely rebutted by the Respondent's denial of knowledge that the union possessed, at any material time, such status.

Moreover, in law, the presumption that a state of things once shown continues to exist does not arise merely upon the basis of some prior presumption. The existence of that which is presumed to continue, must originally have been established by evidence. See American Jurisprudence, Vol. 20, page 205, at § 207, which states the proposition as follows:

> "It is well established that when the existence of a person, a personal relation, or a state of things is once *established by proof*, the law presumes that the person, relation, or state of things continues to exist as before, until the contrary is shown, or until a different presumption is raised from the nature of the subject in question." (Emphasis supplied.)

In the present case the possession of majority status by the union was as of no time established by proof, and hence the finding of such majority in this case is only by a departure from established legal principle and amounts to no more than piling the Pelion of one presumption upon the Ossa of another to reach a result which is not supported by the record.

thority to order the Respondent to bargain with the Union, and in doing so the Board is in fact doing nothing more than requiring the Respondent, under legal compulsion, to adhere to an unlawful arrangement.

As indicated above, I would not find the Respondent to have violated Section 8 (a) (5) by failing in any manner to deal with a labor organization as to which there is a complete negation of majority status.[10] As to the allegations of a Section 8 (a) (3) violation, I would dismiss them also because, in the absence of a showing of majority representation by the Union, the discharge of employees for failure to sign individual contracts governing their relationship with the Respondent cannot, as the General Counsel contends, be found to discourage a right to bargain through the Union.

In view of the disposition which I believe should be made of this case as shown by my opinion above, I

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[10] Even assuming the theory of my colleagues' decision, that the existence of majority representative status can be deduced from the fact merely of execution of a collective bargaining contract, there is yet another reason why it is error to apply it in this case. As above indicated, an examination of the 1953-1955 contract in the record discloses that it was executed by four dairy firms in the Tucson area, and by its terms covers the Respondent's employees in a single unit which includes also the employees of the other employers. In situations involving a multi-employer unit such as this, Board standards require only that the contracting union be the majority-representative of the employees in the unit as a whole, and it is not necessary, for a contract in such larger unit to be lawful, that the contracting union be designated by a majority among the employees of each separate employer. Thus, in any event, the contract can be of no value as an indication of the Union's status among the Respondent's employees considered as a separate unit.

do not reach the questions whether the Respondent complied with Section 8 (d) in negotiating individual contracts with the drivers, whether such contracts were effective in converting the status of employees to that of independent contractors. I shall therefore, with all deference and respect for the Court of Appeals which has remanded this case to the Board, refrain from attempting to resolve what in my view of the case have become only hypothetical issues.

Dated, Washington, D. C. Aug. 13, 1959

Stephen S. Bean, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO ALL EMPLOYEERS: PURSUANT TO A DECISION AND ORDER ON REMAND

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

WE WILL bargain collectively, upon request, with INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL UNION NO. 310, with respect to adoption or continuance of a system of product distribution known as the independent distributorship plan. The appropriate unit is:

> All regular, relief and special drivers and all plantmen employed at our dairy in Tucson, Arizona, excluding all office and clerical employees, guards and supervisors as defined in the Act, as amended.

WE WILL NOT in any manner interfere with, restrain or coerce our employees in the exercise of the right to self-organization, to form labor organization, to join or assist INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL UNION NO. 310, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such rights may be affected by an agreement requiring member-

ship in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act.

All our employees are free to become, remain, or refrain from becoming or remaining members of any labor organization except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition to employment, as authorized in Section 8 (a) (3) of the Act.

SHAMROCK DAIRY, INC.
(Employer)

Dated By
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.